> . . . SMDfund filed a suit in Allen Circuit Court claiming: 1) unconstitutional 1985 enactment of Section 1.1 of IC 8-22-3 establishment of the Authority. . . . [Pet., p. 4.]
>
> The trial court . . . rul[ed] that the general statute of limitations contained in IC 34-11-1-2(a) bars facial constitutional challenges after ten years. SMDfund gave notice of intention to appeal. The Authority then petitioned the Indiana Supreme Court for . . . transfer. SMDfund agreed . . . and the Court heard oral argument. . . . SMDfund argued that the complaint was a public interest complaint involving a violation of the Indiana Constitution and therefore could not be barred by any time constraint. On 2 August 2005, the Court unanimously affirmed dismissal based on the doctrine of laches. . . . [Pet., p. 5.]

With the exception of the above-quoted material, the Airport Authority objects to the remainder of Petitioner's Statement of the Case as perceived misstatements of both law and fact. As such, Petitioner's statement of the case should be disregarded in its entirety, and the Court should instead rely on Respondent's Statement of the Case.

REASONS FOR DENYING THE PETITION

A. The U.S. Supreme Court Lacks Jurisdiction to Review this Case

Very early in this Court's history, it established that it would not decide a Federal Constitutional issue raised for the first time on review of state court decisions. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). In 1809, this Court came to the conclusion that the Judiciary Act of 1789 vested the U.S. Supreme Court with no jurisdiction unless a federal question was raised and decided in the state court below. *Id.* (citing *Owings v. Norwood's Lessee*, 5 Cranch 344 (1809)).

More recently, the Court has held that with very rare exceptions, the Court will not consider a petitioner's federal claim in reviewing a state court judgment under 28 U.S.C.A. § 1257, unless it was either addressed by, or properly presented to, the state court that rendered the decision. *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (*per curiam*). Powerful policy considerations underlie both the statutory requirement and the Supreme Court Rule that a federal challenge to a state statute or other official act be first presented to the state court. *Webb v. Webb*, 451 U.S. 493, 499 (1981). These policy considerations reinforce the court's unwillingness to entertain cases from state courts when a federal question has not been properly raised below. *Id.*

Principles of comity in the federal system require that state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state law or authority based on federal law or construing and applying the applicable federal requirements. *Id.* In a dual system of government, a federal court should not upset a state court

decision without an opportunity to the state court to correct the Constitutional violation. *Id.* at 500.

Declining jurisdiction when federal questions were not raised below is also reinforced for very practical reasons. *Id.* First, the requirement affords the parties the opportunity to develop the record necessary for adjudicating the issue. *Id.* Second, it permits the state court to exercise its authority to construe state statutes so as to avoid or obviate Federal Constitutional challenges. *Id.* Third, the requirement insures that independent and adequate state grounds that obviate the federal issue will be identified and acted upon. *Id.* Finally, presenting federal claims initially to state court ensures that those issues will be adjudicated in the court where necessary to dispose of the case. *Id.* at 501. At a minimum, the record should show with no doubt that a claim under a federal statute or the Federal Constitution was presented in the state court and that the court was apprised of the nature or substance of a federal claim in the time and manner required by state law. *Id.*

The petitioner seeking the writ of certiorari has the burden of showing that the issue was properly presented to the state court. *Adams*, 520 U.S. at 85. When the highest state court is silent on a federal question before this Court, it will assume that the issue was not properly presented below. *Id.* at 86. The aggrieved party bears the burden of defeating the assumption by demonstrating that the state court had a fair opportunity to address the federal question. *Id.* at 87 (quoting *Webb*, 451 U.S. at 501). Petitioner may rebut the assumption by establishing that the federal claim was raised at a time and manner required by state law; by persuading the U.S. Supreme Court that the state procedural requirements could not serve as an independent and adequate state law

ground for the state court's judgment; or demonstrating that the particular federal claim at issue was presented with fair precision in due time. *Id.*

Two cases in particular illustrate the Court's lack of jurisdiction when the federal question is not presented below. In *Adams*, the Alabama Supreme Court affirmed the trial court in approving a settlement agreement of a class action lawsuit that precluded class members from individually suing the defendant for fraud even though all class members did not have the right to exclude themselves from the class or the agreement. The Alabama Court only addressed state law issues, but on petition for writ of certiorari the petitioner argued that the Alabama Supreme Court decision violated the Due Process Clause of the Fourteenth Amendment. The Court in *Adams* found that petitioners failed to carry their burden of showing that their due process claim under the Federal Constitution was properly presented to the Alabama Supreme Court; and therefore, the court dismissed the writ as improvidently granted. *Adams*, 520 U.S. at 90.

In *Cardinale*, the petitioner for writ of certiorari was a criminal defendant who contended that a Louisiana statute that required confessions to be admitted in their entirety was "unconstitutional." Again, because petitioner failed to raise any federal constitutional issue below, the writ was dismissed for lack of jurisdiction. *Cardinale*, 394 U.S. at 439; *see also*, *Roe v. Kansas ex rel. Smith*, 278 U.S. 191 (1929) (dismissing a writ of error and holding that the alleged grounds so lacked in substance as to be frivolous).

Here, petitioner has failed to set forth when a federal question was raised, the method or manner of raising the question, the way in which the state court passed on that

question, or specific portions of the record or summary with references to show that the federal question was timely and properly raised. Upon cursory review of the Record below, it is evident why. None of the plaintiffs, at any time below, ever raised a federal question. No federal question is argued in the Amended Complaint, Plaintiffs' Response to the Motion for Summary Judgment, or in the appeal to the Indiana Supreme Court. At no time prior to his filing of a petition for writ of certiorari did Petitioner raise any federal question.

Even though Petitioner mentions the alleged federal questions presented in his petition here, Petitioner does not develop any argument based on Federal Constitutional law or on a federal statute. Instead, he focuses, as he did below, on the believed improper interpretation of an Indiana statute under the Indiana Constitution and the inapplicability of laches under Indiana common law.

All of the policy considerations underlying the requirement that the federal question be raised below are present in this case. Comity and fairness require that the Indiana Supreme Court should have been afforded the opportunity to respond to Petitioner's attacks on Indiana legislation and the Indiana Constitution if challenged under federal law. The Indiana Supreme Court should have been afforded the opportunity to construe its state's statute and its state Constitution to avoid a Federal Constitutional challenge. Additionally, because the issue before the Indiana Supreme Court was an appeal from summary judgment, the state court would have been the most appropriate forum to raise the federal issues for adjudication or trial. Finally, not only is the record on the federal issue undeveloped, it is completely absent from the record below.

Because no federal issue was raised below, this Court lacks jurisdiction to entertain the Petition for Writ of Certiorari. As such, the Petition should be denied.

B. The Petition is so Procedurally Deficient that Certiorari Should be Denied

The failure of the Petitioner to present with accuracy, brevity and clarity of whatever is essential to ready an adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition for writ of certiorari. S. Ct. R. 14.4. Initially, and as explained above, Petitioner made many misstatements of fact and law in his Statement of the Case and included opinion, argument and conjecture that was not supported by the record. In addition, his petition contains numerous other deficiencies.

Contrary to Rule 14.1(f), Petitioner failed to set forth the constitutional provisions and statutes verbatim with appropriate citations. Next, and contrary to Rule 14.1(g)(i), his Statement of the Case does not contain when the federal question was raised, the method or manner of raising the federal question, or the disposition by the lower court of the federal question. Neither does his Statement of the Case include a quotation to the record or a summary of the federal question. As discussed in Argument Section A, Petitioner could not make such representations regarding when the federal question was raised because no federal question was raised below.

Additionally, and contrary to Rule 29.4(c) and Rule 14.1(e)(v), Petitioner failed to recite in his initial document that 28 U.S.C.A. § 2403(b) may apply, and he did not serve his initial document on the Attorney General of the State of

Indiana. Neither did Petitioner state whether the Indiana Supreme Court certified to the State Attorney General the fact that the constitutionality of a statute of the State of Indiana was drawn into question. The provisions of this Rule are applicable because in his Petition for Writ of Certiorari, Petitioner is questioning the Constitutionality of an Indiana statute under the Federal Constitution.

Perhaps more importantly, Petitioner does not present a clear, concise or cohesive argument for review. The confusing rhetoric presented by Petitioner lacks focus to such a degree that the Court would have to guess at what his arguments are. With few exceptions, the Petitioner's argument section is not supported by citations to legal authority or the Record below. Because of the procedural deficiencies and the lack of a clear argument, even if this Court finds that it has jurisdiction, it should decline to grant certiorari.

CONCLUSION

The case below involved a facial challenge to an Indiana statute as impermissible special legislation under the Indiana Constitution. The Indiana Supreme Court held that the claim was barred under the Indiana common law doctrine of laches. No federal claim or question was ever presented prior to the filing of the Petition for Writ of Certiorari. The Indiana Supreme Court did not have the opportunity to address the federal claims now raised. As such, this Court lacks jurisdiction and should deny the petition for writ of certiorari.

In the event this Court finds a basis for jurisdiction, certiorari should be denied on alternate grounds. Petitioner presents no true federal question, but instead tries to reargue his Indiana state claims here. In addition, Petitioner utterly failed to present the necessary information to this Court in the proper manner, leaving the Court without the means to decide the issues. On any of these grounds, certiorari should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

JOSEPH TOCCI,

Petitioner,

v.

FORT WAYNE – ALLEN COUNTY AIRPORT AUTHORITY, CITY OF FORT WAYNE and ALLEN COUNTY,

Respondents.

On Petition For Writ Of Certiorari To The Indiana Supreme Court

REPLY BRIEF

JOSEPH A. TOCCI, JR.
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Pro se

PARTIES TO THE PROCEEDING

The parties in the proceeding are:

Fort Wayne – Allen County Airport Authority, a municipal corporation.

City of Fort Wayne, a municipal corporation.

County of Allen, a municipal corporation.

SMDfund, Inc., Joe Tocci, Chairman and Scott W. Noble, Treasurer, a public interest advocacy for historic Smith Field Airport.

ARGUMENT

While Respondent's restatement of Petitioner's questions attempts to narrow the court's focus to whether seventeen years is sufficient to justify laches, Petitioner has asked whether any time barring statute or doctrine is sufficient to justify dismissal of constitutional challenges at all. The question isn't whether we've lived with repugnancy long enough to excuse it but whether repugnancy can be excused by application of a time bar. We believe it cannot without creating a general exception to explicit protections enumerated in both constitutions. Moreover, the question of clouded title has been disregarded in the state courts as though it was never presented as separable.

The Greatest Generation did not throw itself into utterly destroying tyrannical governments around the world in order to make it safe for tyrannical governments in our own hometowns to cherry-pick our treasures. The most precious of these is the rule of law. Every single civil right is perpetually at risk to political fashion if it is not guaranteed appeal to a higher court sworn to protect them all. By dismissing this case without testing the constitutionality of IC 8-22-3-1.1, the Indiana's Supreme Court has chosen unanimously to subordinate both of our constitutions to the doctrine of laches. The Court's decision has effectively blocked any legitimate constitutional challenge that is more than 17 years unchallenged. Should not laches have also left *Brown v. Board of Education* unreviewed?

We acknowledge only one factual defect in the statement of the case. The Indiana Supreme Court heard oral argument on 20 December 2004 and not on 30 October as

we misstated on page 5 of the petition. If the Court does not dismiss this petition on the law, then Respondent will surely make issue on the facts. When they detect failure there, they will argue ad hominem as they have through their surrogates in the local press. After all, they are fighting for the survival of a non-elected government that has ruled infamously in defiance of the public will for most of their history. We stipulate to the amateur quality of the petition. But the Petitioner does not pretend to be a lawyer nor does the petition presume to be a legal brief on the case. It is an ordinary citizen's claim of fundamental injury to both of his constitutions. We are anxious to argue all the facts and the law, with counsel, in review and at trial in any court to which this Court should so remand. Petitioner is again arguing for hearing the case, not for deciding it.

Indiana's Justices do not sit in a constitutional vacuum. They sit in our constitutional sanctuary. They have sworn to protect both constitutions and cannot be so neutral in the proceedings as to become unconscious to them. The questions we present to the Court are not arcane. They are salient and threaten crude affronts to the integrity of the American judiciary. From its initial filing, this case was brought as a constitutional challenge. Can any constitutionally prohibited legislative act obtain inoculation against judicial reversal by force of another legislative act or by a time-barring doctrine? If so, the Indiana Supreme Court has successfully innovated an irreparable breach of the U.S. Constitution's requirement for American courts to protect their independence from their legislature or to have otherwise blithely encroached upon the people's unalienable rights.

While the Court may certainly deny certiorari without explanation, we pray that this Court views the dismissal of

our questions as more menacing to the U.S. Constitution than granting its writ. Respondent can argue technical perfection in the Petition because their annually replenished $20,000,000 tax-subsidized budget enables them to hire all the lawyers they wish while our remaining $65,000 personal debt renders us incapable of even retaining present counsel, let alone enduring beyond this petition. The practical effect of requiring perfect legal construction of petitions is to perfect exclusion of all petitioners to America's Supreme Court who can't afford lawyers.

We endured this five-year public interest campaign at great cost to our personal estates and have succeeded in saving the Field. But our success is only temporary. Under Indiana law, Respondent need only publicly announce consideration for closure and vote on the question at least 48 hours later – precisely as they did on 26 June 2002. The Indiana high court's refusal to hear this constitutional challenge to this Indiana law ripened the federal issues presented in our petition. Their unanimous adoption of laches establishes a new precedent for using a time bar against all constitutional challenges to the prerogatives of the Legislature. It gives notice to all Americans that a state supreme court can inoculate the institutions of government against constitutional redress by merely refusing to hear the complaint. The Court should grant Certiorari.

Respectfully submitted,

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